Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

RURAL WIRELESS ASSOCIATION, INC. PETITION FOR RECONSIDERATION AND/OR CLARIFICATION

RURAL WIRELESS ASSOCIATION, INC.

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April 12, 2017

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SUMMARY

Pursuant to Section 1.429 of the Commission's rules, RWA submits this Petition for Reconsideration and/or Clarification of certain provisions of the *MFII Order* adopted in the Commission's Mobility Fund proceeding.

The Commission should reconsider its decision to utilize a 5 Mbps download threshold to determine an area's eligibility for MFII support and instead use a 10 Mbps threshold. The use a 5 Mbps download threshold fails to ensure that rural Americans have access to LTE services that are reasonably comparable to those provided in urban areas. Further, the Commission's decision to use a 5 Mbps download threshold for determining whether an unsubsidized carrier provides qualifying LTE service (thereby causing its service area to be ineligible for MFII support) is arbitrary and capricious.

While the Commission adopted a 5 Mbps download threshold to determine whether an area would be eligible for MFII support, it did not specify (or even discuss) an accompanying upload speed threshold. Under the Commission's area eligibility standard, areas with unsubsidized service at 5 Mbps download but only 500 Kbps upload (or less) would be considered ***ineligible*** for MFII funding. Because upload speeds are crucial to the consumer experience, RWA urges the Commission to clarify that the area eligibility speed standard includes a ***minimum*** 1 Mbps upload threshold.

RWA urges the Commission to reconsider its decision to eliminate from MFII support eligibility those areas where VoLTE service is not available and where only one of the two types of 3G networks is available for voice fallback service via an unsubsidized carrier. Areas left with one network technology are not universally served and, in such areas, subscribers to incompatible networks will be foreclosed from accessing voice and text services, including

emergency (911) services. The support won at auction (or provided via the preservation of service mechanism) that results from this restored eligibility should be revisited in five years along the lines of the Alaska Plan. Failure to allow such support will result in harm to the public when the cessation of support causes these currently-supported networks to be turned down. Alternatively, the Commission should provide for a safety valve to allow these networks to continue to be supported beyond the wind down period proposed in the *MFII Order*.

Finally, the Commission should reconsider its decision to make substantive changes to the tower collocation requirement for MFII support recipients. In the *MFII Order*, the Commission stated that it adopted the same collocation requirement for MFII recipients as it did for Mobility Fund Phase I ("MFI"), with "minor, non-substantive" changes. RWA disagrees with this characterization. Rather than the reasonable collocation requirement adopted for MFI, the Commission expanded the obligation from *newly constructed towers* to "*all towers* that Mobility Fund recipients own or manage in the unserved area for which they receive support." Whether or not to allow collocation on towers built and/or operated absent any universal service support should be a business decision made by individual carriers. It should not be a requirement foisted upon MFII participants, and particularly not without adequate notice of the Commission's intention to do so. Further, the Commission's collocation rule change raises constitutional and Administrative Procedure Act ("APA") concerns.

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Pursuant to Section 405 of the Communications Act of 1934, as amended ("the Act") and Section 1.429 of the Federal Communications Commission's ("FCC" or "Commission") rules,[1] the Rural Wireless Association, Inc. ("RWA")[2] files this petition for reconsideration and/or clarification of the Commission's Report and Order[3] in which the Commission adopted a framework for implementation of Mobility Fund Phase II ("MFII"). RWA addresses several aspects of the *MFII Order* including: (1) the adoption of a 5 Mbps, rather than 10 Mbps, download area eligibility threshold; (2) the need for a 1 Mbps upload area eligibility threshold; (3) the need for an exception to accommodate technological incompatibilities that threaten voice fallback capability and public safety in a limited number of areas; and (4) the adoption of a substantive change to the collocation requirement for MFII support recipients without sufficient notice.

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[1] 47 U.S.C. § 405; 47 C.F.R. § 1.429.

[2] RWA is a 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies who serve rural consumers and those consumers traveling to rural America. RWA's members are small businesses serving or seeking to serve secondary, tertiary, and rural markets. RWA's members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies. Each of RWA's member companies serves fewer than 100,000 subscribers.

[3] *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, WT Docket No. 10-208, FCC 17-11 (rel. Mar. 7, 2017) ("*MFII Order*").

I. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO USE A 5 MBPS DOWNLOAD AREA ELIGIBILITY SPEED THRESHOLD AND INSTEAD USE A 10 MPBS DOWNLOAD THRESHOLD.

RWA urges the Commission to reconsider its decision to utilize a 5 Mbps download threshold to determine an area's eligibility for MFII support and instead use a 10 Mbps threshold. The use of a 5 Mbps download threshold for determining whether an unsubsidized carrier provides qualifying LTE service (thereby causing its service area to be ineligible for MFII support) conflicts with the Commission's statutory mandate to ensure that rural areas have access to services that are reasonably comparable to those available in urban areas, and its adoption was arbitrary and capricious.

a. The Commission's Decision to Use a 5 Mbps Download Threshold Fails to Ensure that Rural Americans Have Access to LTE Services that Are Reasonably Comparable to Those Provided In Urban Areas.

Section 254(b) of the Act "provides that the FCC 'shall' base its universal service policies on" statutory principles established by Congress.[4] These principles include the availability of: (1) "advanced telecommunications and information services" to consumers "in all regions of the Nation"; (2) "[q]uality services" to all Americans at "just, reasonable, and affordable rates";[5] and (3) services in "rural, insular, and high cost areas" that are "reasonably comparable" to those provided in urban areas at reasonably comparable rates.[6]

Based on these statutory requirements, the Commission must adopt a MFII regime that promotes access to LTE services in rural areas at speeds that are reasonably comparable to those available in urban areas. To accomplish this, the Commission cannot simply adopt a reasonable minimal speed requirement for carriers that receive MFII support in eligible areas. It

[4] *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001).
[5] *See* 47 U.S.C. § 254(b)(1).
[6] *See* 47 U.S.C. § 254(b)(3).

must also adopt an equivalent reasonable minimum speed threshold for determining that an area is ineligible for MFII support based on existing service availability.[7]

If the Commission disqualifies areas from receiving MFII support based on the availability of existing unsubsidized LTE service, this disqualification will (at best) maintain the status quo in the ineligible area and could actually reduce service choice and quality. In order to satisfy the statutory principle of "reasonably comparable" wireless service, the existing unsubsidized coverage *must* be provided at speeds that the Commission will ultimately require of MFII support recipients, *i.e.*, 4G LTE service at 10/1 Mbps speed.[8] If the existing unsubsidized LTE service in an area is insufficient compared to urban areas, the Commission's denial of MFII funding will "condemn rural Americans to service that fails to satisfy the core statutory principles of universal service policy."[9]

The Commission should not count on competition to address this problem. RWA has counseled the Commission over and over again that, in areas where rural carriers are forced to turn down service for lack of support, it cannot reasonably expect competitive market forces to

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[7] *See, e.g.*, Letter from Christopher J. Wright, Harris, Wiltshire & Grannis LLP, Counsel to Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 and WT Docket No. 10-208, at pp. 4-5 (Feb. 16, 2017) ("*CCA Ex Parte*"); *see also* Letter from Caressa D. Bennet, General Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90, at p. 1 (Feb. 14, 2017) (expressing concern that the proposed MFII area eligibility standard was 5/1 Mbps while the buildout standard will be 10/1 Mbps, and stating that there should not be two separate standards) ("*RWA February 14 Ex Parte*"); *see also* Letter from Caressa D. Bennet, General Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90, at pp. 2-3 (Feb. 16, 2017) (disagreeing with AT&T *et. al.*'s proposal that the MFII area eligibility standard should be a download speed of at least 5 Mbps, and stating that the area eligibility standard and buildout requirement should be the same – 10 Mbps/1 Mbps) ("*RWA February 16 Ex Parte*").

[8] *See* 47 U.S.C. § 254(b)(3); *see also MFII Order* at ¶ 87 (requiring MFII funding recipients to meet median network data speeds of 10 Mbps or greater download and 1 Mbps or greater upload, with at least 90 percent of the required download speed measurements being not less than a certain threshold speed in the supported area).

[9] *CCA Ex Parte* at p. 5.

prompt network capacity improvements and faster data speeds in a reasonable time period.[10] Despite this, the Commission rejected the need to adopt a 10/1 Mbps area eligibility speed threshold because it "expect[s] that any given area with one…provider[] of unsubsidized qualified 4G LTE will already meet the 10/1 Mbps threshold or will do [so] well before the end of the MF-II support term."[11]

The Commission provides no support for its "expect[ation]" that many areas "with one…provider[] of unsubsidized qualified 4G LTE will already meet the 10/1 Mbps threshold."[12] More importantly, several parties – including RWA and U.S. Cellular – have provided evidence to the contrary.[13]

The Commission also fails to provide support for its "expect[ation]" that areas "with one…provider[] of unsubsidized qualified 4G LTE" will meet the 10/1 Mbps threshold "well before the end of the MF-II term."[14] The Commission should not rely on the marketplace to accomplish this improvement. To date, the unsubsidized carrier(s) in a rural area have been forced to upgrade their mobile wireless voice and broadband service in response to competition

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[10] *See e.g.*, Letter from Caressa D. Bennet, General Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90, at p. 2 (Mar. 31, 2017) (stating that the loss of supported service in rural areas means that there will be no competition to prompt unsubsidized carrier networks over time in those areas) ("*RWA March 21 Ex Parte*"); *RWA February 16 Ex Parte* at pp. 2-3; *RWA February 14 Ex Parte* at pp. 1-2. *See also CCA Ex Parte* at p. 5.

[11] *MFII Order* at p. 38, n. 220.

[12] *Id.*

[13] *RWA February 14 Ex Parte* at p. 1 and Ex. 1 (comparing areas considered "covered" at 10/1 Mbps versus a much larger area considered "covered" at 5/1 Mbps); *see also* Letter from David LaFuria, Lukas LaFuria Gutierrez & Sachs LLP, Counsel for United States Cellular Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90, at p. 2 (Feb. 17, 2017) (submitting: (1) a map of Kansas drawn from FCC Form 477 data depicting almost homogenous coverage throughout the state by multiple carriers; and (2) a map of U.S. Cellular's ETC service area in eastern Kansas using a -85 dBm contour depicting many areas where service quality is not reasonably comparable to what is available in urban areas.) ("*U.S. Cellular Ex Parte*").

[14] *MFII Order* at p. 38, n. 220.

from the subsidized carrier(s) serving the same area. Rural consumers have benefitted from this competition. But very rural and remote areas will not support service by an additional carrier without MFII support. In the absence of MFII funds, currently supported carriers may be forced to turn off service on certain towers.[15] In areas where rural carriers are forced to turn down service for lack of support, the unsubsidized provider would face "no affirmative requirement to improve speeds and service quality absent the threat of competitive entry."[16] Existing buildout requirements do not require licensees to provide coverage that meets an established speed threshold,[17] and the Commission's speed-based performance requirements would apply only to MFII support recipients.[18] Establishing the same speed threshold of 10 Mbps download and 1 Mbps upload for determining ineligible areas and for receipt of MFII support is critical to ensuring that rural Americans receive services that are "reasonably comparable" to those provided in urban areas at reasonably comparable rates.[19]

Not only has the Commission failed to justify its expectation that "any given area with one…provider[] of unsubsidized qualified 4G LTE will already meet the 10/1 Mbps threshold or will do [so] well before the end of the MF-II support term,"[20] the Commission has already determined that a 5 Mbps download speed is simply not good enough to meet the needs

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[15] *See, e.g.*, Comments of Cellular South Licenses, LLC d/b/a C Spire at 8, WT Docket No. 10-208 et al., (filed Aug. 8, 2014) (stating that "[o]nce facilities are constructed in rural and high-cost areas . . . [a]ny further reduction could well result in carriers['] decommissioning existing facilities—thereby reducing mobile broadband services in some rural areas.")

[16] *CCA Ex Parte* at p. 5; *see also RWA February 14 Ex Parte* at p. 3 (stating that there will be no competition to prompt network improvements over time).

[17] *See, e.g.*, 47 C.F.R. § 27.14.

[18] *CCA Ex Parte* at p. 5; *see also MFII Order* at ¶ 87 (requiring MFII funding recipients to meet median network data speeds of 10 Mbps or greater download and 1 Mbps or greater upload, with at least 90 percent of the required download speed measurements being not less than a certain threshold speed in the supported area).

[19] *See* 47 U.S.C. § 254(b)(3).

[20] *MFII Order* at p. 38, n. 220.

of consumers. In its 2016 *CAF II Order*,[21] the Commission established "technology-neutral tiers of bids" for the Connect America Fund Phase II auction.[22] In particular, it determined that the "*minimum* performance tier requires…broadband speeds of at least 10 Mbps downstream and 1 Mbps upstream (10/1 Mbps)."[23] In fact, the Commission states that "10/1 Mbps" should not be the "end goal" for support recipients, and that it "expect[s] and encourage[s] participants to innovate and provide better service over the 10-year term" in order to "ensure that rural America is not left behind, and the consumers in those areas benefit from innovation and advances in technology."[24] If 10/1 Mbps is the absolute *minimum* service speed that is deserving of technology neutral universal service support – then why is a 5 Mbps download threshold acceptable for disqualifying an area from MFII support eligibility?

The simple truth is that 5 Mbps service *is not* acceptable. In fact, in the *2016 Broadband Progress Report*, the Commission explicitly disagreed with the suggestion that it should adopt a mobile speed benchmark of 5 Mbps/1 Mbps.[25] The Commission found that "5 Mbps/1 Mbps" service is insufficient to support "uses that require high speeds," including "video calls, streaming media and real-time educational courses" that are "becoming increasingly common."[26] These applications are critical in rural America, as they support remote work sites,

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[21] *Connect America Fund, et. al.,* Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, et. al., FCC 16-64 (rel. May 26, 2016) (*CAFII Order*).
[22] *CAFII Order* at ¶ 2.
[23] *Id.* (emphasis added).
[24] *Id.* at ¶¶ 14, 16.
[25] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Development Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report, 31 FCC Rcd. 699 ¶ 58 (2016) ("*2016 Broadband Progress Report*").
[26] *Id.*

telework applications, telemedicine and rural learning programs, as the record demonstrates[27] and as the Commission has recognized.[28]

Further, the Commission has found that Americans living in urban areas are nearly twice as likely to have access to LTE at speeds of 10 Mbps/1 Mbps.[29] In particular, the Commission found that 87 percent of rural Americans lack access to LTE service with a minimum advertised speed of 10 Mbps/1 Mbps LTE service, compared to just 45 percent of Americans in urban areas.[30] This gulf between the service available in rural and urban areas makes clear that 5 Mbps service is not "reasonably comparable" LTE service to the LTE service that is available to urban Americans today – and it will be increasingly insufficient as support to ineligible areas is phased out, formerly supported carriers are forced to turn down service, and coverage from the unsubsidized carrier remains stagnant absent any competitive pressure.

b. The Commission's Decision to Use a 5 Mbps Download Threshold for Determining Whether an Unsubsidized Carrier Provides Qualifying LTE Service is Arbitrary and Capricious.

The *MFII Order* includes no discussion of whether or not a 5 Mbps download speed is "reasonably comparable" to the service that is available in urban America. Nor does it include any analysis as to whether or not a 5 Mbps download speed would sufficiently enable the high-

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[27] *See* Letter from Caressa D. Bennet, General Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90 (Oct. 20, 2016) (stating the importance of mobile broadband service to rural areas in order to support telehealth and education programs). *See also* Comments of Competitive Carriers Association at p. 2, WT Docket No. 10-208 *et al.*, (filed Jan. 11, 2017) (discussing the critical importance of mobile connections to healthcare and job creation).

[28] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Development Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report, 30 FCC Rcd. 1375, at ¶ 2 (2015) (stating that "[n]ew technologies and services such as real-time distance learning, telemedicine…are pushing demand for higher broadband speeds…").

[29] *2016 Broadband Progress Report* at ¶ 83.

[30] *Id*.

speed applications that are so vital in rural areas. Instead, the Commission reviewed the available coverage data and decided to use a 5 Mbps download threshold because "[nationwide carriers] are generally reporting the deployment of 4G LTE…at minimum advertised download speeds of ***at least*** 5 Mbps."[31] The Commission's decision to use a 5 Mbps download threshold for determining whether an unsubsidized carrier provides qualifying LTE service appears to be based solely upon the fact that data showing where nationwide carriers have reported 5 Mbps download speeds is conveniently available. Further, the fact that 4G LTE deployment is reported at minimum advertised download speeds of "*at least* 5 Mbps"[32] doesn't mean that 5 Mbps download speeds are "reasonably comparable" to speeds available in urban areas or sufficient to meet the needs of rural consumers – it means only that 5 Mbps download speeds are the minimum 4G LTE speeds reported.

The adoption of an arbitrary 5 Mbps eligibility threshold, based on unreliable (and often inflated) coverage data,[33] will leave a large portion of rural America ineligible for MFII funding – and without sufficient or "reasonably comparable" service. RWA recognizes that the current MFII budget is insufficient to build networks capable of reaching 10 Mbps/1 Mbps nationwide. However, lowering the standard of acceptable mobile wireless service in rural

[31] *MFII Order* at ¶ 51 (emphasis added).
[32] *Id.* (emphasis added).
[33] *U.S. Cellular Ex Parte* at p. 2 (stating that the Form 477 data is significantly flawed and that this is a fact conceded by every FCC official with which the matter has been discussed); Letter from David LaFuria, Lukas, Nace, Gutierrez & Sachs LLP, Counsel for United States Cellular Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90, at p.1 (Oct. 27, 2016) (providing a study of coverage in rural areas of South Carolina that revealed different levels of coverage in rural areas compared to aggregated FCC Form 477 data, and consistently lower coverage levels, and fewer successful connections to 4G LTE data networks than the aggregated Form 477 data might be interpreted to suggest); *see also* Letter from Trey Hanbury, Hogan Lovells, Counsel to the Competitive Carriers Association to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90, at p.2 (Oct. 25, 2016) (stating that Form 477 data provides an unreliable view of mobile broadband coverage, particularly in rural areas and areas of low-population density).

America in order to tout a more densely shaded "coverage" map will do nothing to change reality – it will simply hide the ball, and leave rural Americans with substandard mobile broadband and few (if any) options to improve it for at least a decade. In order to clearly understand where coverage is lacking and ensure that rural residents have "reasonably comparable" mobile broadband coverage that will suffice for high speed applications, the Commission should base MFII area eligibility decisions on a speed threshold of 10 Mbps/1 Mbps. A 5 Mbps speed threshold, adopted not because it will provide "reasonably comparable" service but because it is easily implemented with data on hand, is arbitrary and capricious. Rural Americans should not be forced to compromise on mobile wireless service quality – service that is vital for public safety, healthcare, education, economic development, and access to every day necessities.

II. THE COMMISSION SHOULD CLARIFY THAT THE AREA ELIGIBILITY SPEED STANDARD INCLUDES A 1 MBPS UPLOAD THRESHOLD.

As discussed in Section I, the Commission adopted a 5 Mbps download threshold to determine whether an area would be eligible for MFII support.[34] Unless the Commission is rightfully persuaded to increase this threshold, an area will not be included in the MFII reverse auction, and will therefore not be eligible for ongoing MFII support, if an unsubsidized carrier has reported upload speeds of at least 5 Mbps on its Form 477 in that area. Confusingly, and despite a number of docket filings that explicitly discuss the issue,[35] the Commission did not

[34] *MFII Order* at ¶ 51 (stating "[l]ooking to the mobile speeds generally reported by nationwide carriers on their Form 477 submissions, we find that such carriers are generally reporting the deployment of 4G LTE reported at minimum advertised download speeds of at least 5 Mbps. We accordingly will use this speed benchmark to identify areas eligible for MF-II").

[35] *See e.g.*, Letter from Caressa D. Bennet, General Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90 (Nov. 10, 2016); *see also RWA February 14 Ex Parte* at p. 1; *see* also *RWA February 16 Ex Parte* at pp.2-3 (all discussing the need for a 10/1 speed threshold); *see also* CCA *Ex Parte* at p. 5 (discussing both upload and download thresholds); *see also* Letter from Mark. N. Lewellen, Manager, Spectrum Policy, Deer & Company to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-

specify (or even discuss) an accompanying upload speed threshold.[36]

It is possible that the Commission simply assumed that where a wireless carrier is able to provide a 5 Mbps download speed, it also provides a 1 Mbps upload speed. However, this assumption is incorrect. It is quite common for wireless networks to have a download speed of at least 5 Mbps, but an upload speed of less than 1 Mbps.[37]

Under the Commission's area eligibility standard, areas with unsubsidized service at 5 Mbps download but only 500 Kbps upload (or less) would be considered ***ineligible*** for MFII funding. This means that areas currently served by subsidized rural carriers at 5 Mbps/1 Mbps (and often 10 Mbps/1 Mbps or greater) speeds will be ineligible for MFII support – and rural consumers may lose that service – if an unsubsidized carrier is only providing 5 Mbps download and less than 1 Mbps upload. This will strand rural consumers by sticking them with *worse* service from unsubsidized providers because the Commission failed to define a corresponding upload speed. Again, there will be no competition to prompt network improvements over time, and no guarantee of another Mobility Fund auction to improve service. Because upload speeds are crucial to the consumer experience, RWA urges the Commission to clarify that the area eligibility speed standard includes a ***minimum*** 1 Mbps upload threshold.

208, WC Docket No. 10-90, at p. 5 (Feb. 16, 2017) (urging the Commission "to consider identifying a minimum average upload speed as well as download speed to support precision agriculture" and "help farmers to take advantage of advanced telematics and agronomic analysis integral to precision agriculture.")

[36] *See MFII Order* at ¶ 51 (discussing only a minimum download speed of 5 Mbps and providing no discussion of minimum upload speed); *see also* Public Notice, *The Wireless Telecommunications Bureau and the Wireline Competition Bureau Propose to Release Form 477 4G LTE Mobile Speed Data to Facilitate Implementation of Mobility Fund II Support*, DA 17-286 (rel. Mar. 29, 2017) ("[t]o identify those geographical areas potentially eligible for such support, the Commission decided to use 4G LTE deployment at a minimum advertised download speed benchmark of at least 5 Mbps, based on service providers' Form 477 filings").

[37] *RWA March 21 Ex Parte* at pp. 1-2.

III. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO ELIMINATE FROM SUPPORT ELIGIBILITY THOSE AREAS WHERE VOLTE SERVICE IS NOT AVAILABLE AND WHERE ONLY ONE OF THE TWO TYPES OF 3G NETWORKS IS AVAILABLE FOR VOICE FALLBACK SERVICE VIA AN UNSUBSIDIZED CARRIER.

RWA urges the Commission to reconsider its decision to eliminate from MFII support eligibility those areas where VoLTE service is not available and where only one of the two types of 3G networks is available for voice fallback service via an unsubsidized carrier. As RWA and others have warned,[38] areas left with one network technology are not universally

[38] *See Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Comments of United States Cellular Corporation; NE Colorado Cellular, Inc., d/b/a Viaero Wireless; Smith Bagley, Inc.; Union Telephone Company, d/b/a Union Wireless; Cellular Network Partnership, An Oklahoma Limited Partnership; Nex-Tech Wireless, LLC; Texas 10, LLC, d/b/a Cellular One; Central Louisiana Cellular, LLC, d/b/a Cellular One; Carolina West Wireless, Inc.; Cellcom Companies; PR Wireless, Inc., d/b/a Open Mobile, at p. viii (Aug. 8, 2014) (stating that "[a]reas that have some mobile broadband coverage should not be eliminated from receiving support because, without further investment, citizens in these areas will be relegated to an inferior experience due to the fact that devices work on a CDMA- or GSM-based network, but not both"); *see also Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Comments of Cellular South Licenses, LLC d/b/a C Spire ("C Spire"), at p. 9 (Aug. 8, 2014) (noting that "[a]ny one citizen currently has access to only 50 percent of the total network deployed nationwide (assuming GSM/CDMA are split evenly). So unless a rural consumer can afford to carry two phones, she will drive around rural America with service in some areas, but not others"); *see also Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Reply Comments of Copper Valley Wireless, LLC, at p. 3 (Sept. 8, 2014) (stating "[i]f either AT&T (which uses a GSM platform) or Verizon (which uses a CDMA platform), but not both, are present, the consumer will be relegated to inferior coverage because GSM and CDMA technologies are not compatible"); *see also* Notice of Ex Parte Presentation of Panhandle Telephone Cooperative, Inc., WT Docket No. 10-208 (Dec. 5, 2014); *see also* Notice of Ex Parte Presentation of Panhandle Telephone Cooperative, Inc. and Pine Belt Telephone Company, Inc., WT Docket No. 10-208, at p. 4 (Apr. 23, 2015) (stating that "[t]he rollout of VoLTE continues to be slow-going and will not be truly universal until all handsets are fully VoLTE compatible across all networks, so there is a need to ensure the continued availability of both CDMA and GSM networks well into the foreseeable future so Americans have universal access to voice service"); *see also* Letter from Erin P. Fitzgerald, Assistant Regulatory Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90 (Aug. 26, 2015); *see also* Letter from Anthony K. Veach, Sr. Regulatory Counsel and Erin P. Fitzgerald, Regulatory Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90, at p. 3 (Dec. 22, 2015); *see also* Letter from David LaFuria, Counsel for U.S. Cellular, to Marlene H. Dortch, Secretary, FCC,

served and, in such areas, subscribers to incompatible networks will be foreclosed from accessing voice and text services, including emergency (911) services.

The March 8, 2017 nationwide AT&T outage affecting VoLTE 911 calls underscores the need to ensure uninterrupted access to 911 services.[39] RWA agrees with Chairman Pai's statement in response to that outage that "[e]very call to 911 must go through," and with the Public Safety and Homeland Security Bureau that "[a]ccess to 911 emergency services is

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WT Docket No. 10-208, Attachment at p. 17 (Feb. 25, 2016) ("A person with a CDMA-only phone cannot complete a call when they are in an areas served only by GSM, and vice-versa…For public safety, it is critical that rural Americans have access to wireless networks capable of connecting both kinds of devices, just as those who live in cities do."); *see also* Letter from Caressa D. Bennet, General Counsel and Erin P. Fitzgerald, Regulatory Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90, at pp. 4-5 (Apr. 13, 2016) (stating that the GSM/CDMA incompatibility issue raises serious public safety concerns); *see also* Letter to Marlene H. Dortch, Secretary, FCC, from Caressa D. Bennet, General Counsel, Rural Wireless Association, Inc., WT Docket No. 10-208, WC Docket No. 10-90, at pp. 9-11 (Aug. 23, 2016); *see also* Letter to Marlene H. Dortch, Secretary, FCC, from Rebecca Murphy Thompson, EVP & General Counsel, Competitive Carriers Association, WT Docket No. 10-208, at p. 2 (Sept. 13, 2016) ("the FCC can help to ensure coverage when a wireless consumer falls back from its carrier's LTE network. Any USF reform that fails to account for this fallback threatens to disconnect rural consumers from public safety access, roaming capabilities, and 9-1-1 service"); *see also* Letter to Marlene H. Dortch, Secretary, FCC, from Rebecca Murphy Thompson, EVP & General Counsel, Competitive Carriers Association, WT Docket No. 10-208, at p. 2 (Oct. 13, 2016) (noting that that "coverage in rural areas cannot be considered ubiquitous for consumers in areas served only by a CDMA carrier or a GSM carrier until carriers have universally implemented VoLTE roaming and all consumers have access to devices capable of receiving interoperable VoLTE service"); *see also RWA October 20 Ex Parte* at p. 3 (urging the Commission to recognize that support for a CDMA carrier where an unsubsidized GSM carrier provides service (or vice versa), or support for both a CDMA and GSM carrier in an area is not duplicative); *see also* Letter from Jill Canfield, Vice President, Legal & Industry and Assistant General Counsel, NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208 *et al.*, at p. 3 (Feb. 15, 2017) (stressing the "the importance of recognizing that the GSM and CDMA networks are incompatible" and that "[f]lash cutting all support where only one LTE network is currently available could result in a total loss of voice service for existing consumers, including even the ability to dial 911").

[39] *See Investigation into AT&T Mobility Outages on March 8, and March 11, 2017*, Comments of AT&T, PS Docket No. 17-68 (Apr. 7, 2017).

essential for all Americans, especially the most vulnerable."[40] However, when discussing the possible inability to reach 911 as a result of this CDMA/GSM network incompatibility, the Commission merely stated "[a]s has been the case since carriers deployed such networks, when customers of one provider leave that provider's service area, they may or may not be able to place or receive calls, including emergency calls, depending on the network deployments in their destination."[41] The Commission fails to recognize that service loss due to this CDMA/GSM incompatibility would impact *not only* consumers traveling through these rural areas, *but also* rural consumers trying to make calls from locations at which they have had voice service in the past – locations in their home service area.

The Commission appears to have misunderstood what is necessary to solve this temporary problem. First, the Commission based its decision on the fact that it is "unable to support *three* different network technologies in *every area of the country* in light of our finite budget…" [42] However, MFII support will not be necessary to support *three* different technologies. In order to ensure preservation of critical voice services and access to emergency communications, the Commission's MFII rules should preserve MFII eligibility for those areas where only one unsubsidized LTE network is present and the fallback circuit switched network to support voice when VoLTE is ***not*** available is either CDMA or GSM. In such situations, an *unsubsidized* carrier is providing LTE service along with either CDMA or GSM network capabilities to provide necessary voice fallback, thus leaving only *one* technology (the technology not provided as voice fallback by the unsubsidized carrier – *i.e.*, CDMA or GSM) not

[40] *See* Press Release, *FCC Chairman Ajit Pai Announces Investigation Into Yesterday's Outage* (Mar. 9, 2017) ("*AT&T 911 Outage Press Release*").
[41] *MFII Order* at ¶ 54.
[42] *Id.* (emphasis added).

ensured. Accordingly, ensuring that an area has access to the other 3G network via a supported carrier requires subsidizing only *one* technology – not *three*.

Next, the *MFII Order* indicates concern that such support would be necessary in "every area of the country." This is simply not the case. RWA and other parties have noted that this issue is not applicable to a significant portion of the country, and that the eligibility exception will only be necessary in a limited number of areas.[43]

Finally, the *MFII Order* fails to establish a limit as to how long this MFII eligibility and resulting support would be necessary. This eligibility exception *does not* need to be permanent – or even last the entire MFII support term. As RWA and other parties have noted, this issue is one that time and ubiquitous VoLTE deployment will eventually solve. However, RWA does not believe that the Commission's planned MFII schedule provides enough time for this to occur. RWA urges the Commission to reconsider its rules to preserve MFII eligibility for those areas where only one unsubsidized LTE network is present and the fallback circuit switched network to support voice when VoLTE is not available is either CDMA or GSM. The resulting support won at auction (or provided via the preservation of service mechanism) should be revisited in five years along the lines of the Alaska Plan. Failure to allow such support will result in harm to the public when the cessation of support causes these currently supported networks to be turned down. Alternatively, the Commission should provide for a safety valve to allow these networks to continue to be supported beyond the wind down period proposed in the

[43] *See RWA February 14 Ex Parte* at p. 3 (noting that this issue is not applicable to a significant portion of the country, and that it was aware of only a few rural wireless carriers' service areas that would be impacted). *See also* Letter from Robert A. Silverman, Bennet & Bennet PLLC, Counsel to Panhandle Telephone Cooperative, Inc. and Pine Belt Cellular, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90, at p. 4 (Feb. 15, 2017) (stating that filers PTCI and Pine Belt Wireless were aware of a limited number of affected service areas of other wireless carriers, including areas served by Cross Wireless, Union Wireless, and STRATA Networks).

MFII Order. A safety valve could provide targeted support for specific areas to preserve voice service – a stated goal of the Commission.[44]

IV. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO MAKE SUBSTANTIVE CHANGES TO THE TOWER COLLOCATION REQUIREMENT.

In the *MFII Order*, the Commission stated that it adopted the same collocation requirement for MFII recipients as it did for Mobility Fund Phase I ("MFI"), with "minor, non-substantive" changes.[45] RWA disagrees with this characterization and urges the Commission to reconsider its collocation rule language to ensure that it is not overbroad. As currently written, towers that have not been subsidized would be subject to MFII collocation requirements.

a. The Commission Did Not Provide Sufficient Notice Regarding the Collocation Rule Change.

The collocation requirement that the Commission adopted for MFII is substantively different than what was used for MFI, but parties were not provided notice of this change. The collocation rule adopted for MFI provides:

> [T]he recipient shall allow for reasonable collocation by other providers of services that would meet the technological requirements of Mobility Fund Phase I on ***newly constructed towers*** that the recipient owns or manages in the area for which it receives support. In addition, during this period, the recipient may not enter into facilities access arrangements that restrict any party to the arrangement from allowing others to collocate on the facilities.[46]

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[44] *See e.g.*, *MFII Order* at ¶ 76 (describing the MFII preservation-of-service mechanism and noting that "support is necessary to preserve service for consumers"); *see also AT&T 911 Outage Press Release* (announcing an investigation into an AT&T 911 outage and stating that "[e]very call to 911 must go through"); *see also Connect America Fund et. al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, WC Docket No. 14-58, at ¶ 97 (July 14, 2014) ("We remain committed to working…to advance our goals of preserving voice service…").

[45] *MFII Order* at ¶ 102.

[46] 47 C.F.R. 54.1006(d).

In the *USF/ICC Transformation FNPRM*,[47] the Commission proposed to adopt the same collocation and voice and data roaming obligations that it adopted for MFI. The 2012 *Further Inquiry* did not mention collocation at all.[48] The 2014 *Further Notice* did not discuss collocation, but did include a collocation requirement in its proposed rules that was virtually identical to the rule governing MFI:

> [T]he recipient shall allow for reasonable collocation by other providers of services that would meet the technological requirements of Mobility Fund Phase II on ***newly constructed towers*** that the recipient owns or manages in the area for which it receives support. In addition, during this period, the recipient may not enter into facilities access arrangements that restrict any party to the arrangement from allowing others to collocate on the facilities.[49]

However, despite statements to the contrary, the *MFII Order* includes language that is substantively different than what was used for MFI and was proposed for MFII:

> [T]he recipient shall allow for reasonable collocation by other providers of services that would meet the technological requirements of Mobility Fund Phase II on ***all towers*** it owns or manages in the area for which it receives support. In addition, during this period, the recipient may not enter into facilities access arrangements that restrict any party to the arrangement from allowing others to collocate on the facilities.[50]

This substantive rule change would require a MFII recipient to allow for collocation on all of its towers in the area for which it receives support – this would include towers built prior to the receipt of MFII support that were built and maintained without *any* support. While

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[47] *Connect America Fund, et. al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, *et. al.*, FCC 11-161, 26 FCC Rcd at 18076, ¶ 1148 (rel. Nov. 18, 2011) (stating "[w]e have adopted various [collocation and voice and data roaming] conditions with which Phase I Mobility Fund support recipients must comply...We seek comment on adopting similar requirements for Phase II recipients") ("*USF/ICC Transformation FNPRM*").

[48] Public Notice, *Further Inquiry Into Issues Related to Mobility Fund Phase II*, WC Docket No. 10-90, WT Docket No. 12-208, DA 12-1853 (Nov. 27, 2012).

[49] *Connect America Fund, et. al.*, Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, *et. al.*, FCC 14-54, at Appendix B, p. 134 (rel. June 10, 2014) ("*2014 Further Notice*") (emphasis added).

[50] *MFII Order* at Appendix A, p. 99 (emphasis added).

federal agencies are free to adopt rules that are not identical to those described in an NPRM where any differences are sufficiently minor and could have been anticipated by interested parties,[51] in order to comply with its notice obligations under the APA, an agency must alert interested parties "to the possibility of the agency's adopting a rule different than the one proposed."[52] The adequacy of the notice, then, depends on whether the final rule is a "logical outgrowth" of the proposed rule.[53] The *2014 Further Notice*'s inclusion of a proposed rule substantively identical to the one adopted for MFI with no accompanying commentary did not alert interested parties to the possibility that the Commission planned to adopt a rule that would dramatically increase the scope of the collocation requirement for MFII. Whether or not to allow collocation on towers built and/or operated absent any universal service support should be a business decision made by individual carriers. It should not be a requirement foisted upon MFII participants, and particularly not without adequate notice of the Commission's intention to do so.

b. The Commission's Collocation Rule Change Raises Constitutional and APA Concerns.

In practice, the MFII collocation requirement would mandate an MFII recipient to allow competitors to collocate on *any* of its towers located in a supported area – including towers that were constructed independently of Mobility Fund support and, in many cases, without any universal service funds whatsoever. The FCC supplies no reasoning or explanation to support this substantial expansion of the reasonable collocation requirement. By the mere circumstance of a tower's location, the FCC has suddenly and severely imposed a new universal service public

[51] *Nat'l Cable Television Assn., Inc. v. FCC*, 747 F. 2d 1503, 1507 (D.C. Cir. 1984).
[52] *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994). *See also Sprint v. FCC*, 315 F. 3d 369 (D.C. Cir. 2003) (vacating a rule where the Commission failed to give adequate notice that it was considering a change in reporting requirements that were more burdensome under the new rule).
[53] *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

interest obligation on a carrier's property interest that may have existed prior to the receipt of any universal service support. Additionally, given that the current form of legacy support is based on the now eliminated identical support rule and wireless carriers receiving legacy support have never indicated how such support has been targeted, the Commission has no data to determine whether any legacy support has ever been used to construct or maintain tower infrastructure. Accordingly, this action has raised the specter of overregulation and constitutional overreach in MFII.

The FCC's imposition of a regulation that significantly impairs the enjoyment of property interests without due compensation violates the due process and takings clauses of the Constitution.[54] Although MFII recipients would receive compensation in the form of MFII support, such support would not constitute "due compensation" under established precedent. In *Bell Atlantic Telephone Co. v. Federal Communications Commission*[55] involving a pair of Commission orders that required local telephone exchange companies to set aside a portion of their central offices for occupation and use by competitive access providers, the D.C. Circuit found that the FCC at the time lacked the authority to force telephone companies to permit competitors to connect to the telephone system on company premises.[56] The fact that the

[54] U.S. Const. amends. V & XIV.

[55] *Bell Atlantic Telephone Co. v. Federal Communications Commission*, 24 F.3d 1441, 1443 (D.C. Cir. 1994) ("*Bell Atlantic*"). ("The [FCC's] orders raise constitutional questions that override our customary deference to the Commission's interpretation of its own authority").

[56] *Bell Atlantic* was superseded by statute with the enactment of the Telecommunications Act of 1996, which provided explicit congressional authorization for physical collocation by competitive carriers of "equipment *necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier*, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations." 47 U.S.C. § 251(c)(6) (emphasis added). Because the collocation of wireless equipment on a tower does not involve interconnection or access to unbundled network elements, the constitutional concerns raised in *Bell Atlantic Telephone* remain applicable.

telephone companies were allowed to file new tariffs to obtain compensation from the competitive access providers for the reasonable cost of collocation did not defeat the court's constitutional concern because the tariffs set by the Commission may not be sufficient for the telephone companies to recover due compensation.[57] Similarly, the FCC lacks the authority to expand and impose its reasonable collocation requirement from newly constructed towers to all towers. Towers that existed prior to the Mobility Fund, for instance, are the property interests of the carriers and do not necessarily have a rational connection with the Mobility Fund. Moreover, for MFII recipients this new requirement is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, and violates the APA as a rulemaking subject to the APA's notice-and-comment requirements[58] because, as noted earlier, the requirement adopted for MFII is substantively different than what was used for MFI, and parties were not provided advance notice of this substantive change. To cure this defect, the Commission should reconsider the new collocation requirement and adopt the same collocation requirement adopted for MFI, namely that if MFII funds are used for construction and/or maintenance of a tower, then and only then, is it subject to the colocation requirement.

V. CONCLUSION

RWA is dedicated to helping its carrier members preserve and expand wireless broadband service throughout rural America, and is appreciative of the Commission and staff's efforts in this proceeding. RWA urges the Commission to reconsider its adoption of a 5 Mbps, rather than 10 Mbps, download area eligibility threshold in order to ensure that rural Americans have access to mobile wireless service that is "reasonably comparable" to that available in urban areas. Further, because upload speeds are crucial to the consumer experience, RWA urges the

[57] *See Bell Atlantic,* 24 F.3d at 1445 n.3.
[58] 5 U.S.C. § 706(2)(B).

Commission to clarify that the area eligibility speed standard includes a 1 Mbps upload threshold. Additionally, in order to alleviate public safety concerns related to the loss of voice service in a limited number of areas, the Commission should reconsider its decision to eliminate from MFII support eligibility those areas where VoLTE service is not available and where only one of two types of 3G networks is available for voice fallback service via an unsubsidized carrier. Finally, the Commission should reconsider its decision to implement substantive changes to the tower collocation requirement in the absence of sufficient notice of its intention to do so, and to avoid imposing an unconstitutional taking on carriers. RWA looks forward to its continued work with the Chairman, Commissioners, and Commission staff in this proceeding.

Respectfully submitted,

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April 12, 2017